SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 265

CLYDE-MALLORY LINES,

Libellant-Petitioner,

v.

STEAMSHIP EGLANTINE

UNITED STATES OF AMERICA,

Intervenor-Respondent.

REPLY BRIEF FOR PETITIONER

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CITATIONS

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This is not a suit against the United States. It is a suit against a privately owned vessel *in rem* based upon a collision lien. In admiralty the vessel is herself regarded as the legal entity and is a wrongdoer separate and apart from her owner. This is well settled by a long line of cases.

The China, 7 Wall. 53, 68.
The John G. Stevens, 170 U. S. 113, 120.
The Barnstable, 181 U. S. 464, 467.

Petitioner did not need or resort to the waiver of immunity afforded by the Suits in Admiralty Act. Until the United States voluntarily intervened, this was a suit between private parties (Petitioner's main brief, p. 8).

Respondent relies upon *The Western Maid*, 257 U. S. 419. That case dealt with public, not merchant vessels of the United States (our main brief, p. 7). The Court was particular to point out that the vessels involved "were employed for public and Government purposes, and were owned *pro hac vice* by the United States" (Opinion, p. 431).

Berizzi Brothers Company v. *Steamship Pesaro*, 271 U. S. 562, is not in point. There the *Pesaro* was owned and possessed by a friendly foreign government. The libel was *in rem* on a claim for damages arising out of a failure to deliver certain cargo. The vessel was arrested upon the usual process and released on bond. In the libel the vessel was described as a general ship engaged in common carriage of merchandise for hire. The Italian Ambassador to the United States filed a suggestion that the vessel was immune from process of the Courts. It was stipulated that the vessel when arrested was owned, possessed and controlled by the Italian Government and the plea of immunity was granted. The question decided by this Court was whether a ship owned and possessed by a foreign government and operated by it in the carriage of merchandise for hire is immune from arrest under process based upon a libel *in rem* by a private suitor. This Court held that the District Court rightly dismissed the libel for want of jurisdiction upon the ground that merchant ships owned and operated by a foreign government have the same immunity that warships have.

In *In re United States Steel Products Company* (*Steel Inventor-Woolsey*), 24 F. (2d) 657, 660 (C. C. A. 2), a collision between steamship *Steel Inventor* and destroyer *Woolsey*, it was contended that the appellants should have proceeded under the Public Vessels Act of 1925, and that by the provisions of that act the appellants were barred for failure to proceed within the one-year limitation named in the act. The Court said:

"Section 5 of the Act approved March 9, 1920 (46 USCA § 745; Comp. St. § 1251 1/4d) provides that suits as 'herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on

causes of action arising prior to the taking effect of this act shall be brought within one year after this act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.' The argument is that this provision is incorporated by reference into the act of 1925 and provides a one-year limitation for causes of action arising before its passage" (p. 660).

The Court went on to say that the statute applies only where an action is brought under the act, and as the action was not brought under the act, the statutory period provided for was not applicable (p. 660).

And the Court held that the remedy was not exclusive, saying:

"Nor does the act of 1925 provide an exclusive remedy. It provides that a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States for damages caused by a public vessel of the United States, and for compensation for towage and salvage service, including the contract salvage rendered to a public vessel of the United States. 43 Stat. 1112 (46 USCA §§ 781-790; Comp. St. §§ 1251¾—1 to 1251¾—10). A cross-libel is provided for by section 3. But such a cross-libel is permitted where the United States waives its immunity and files its cross-libel. The Thekla, supra. The section does not require the procedure, but permits it merely by filing a cross-libel" (pp. 660-61).

In *The Lake Monroe*, 250 U. S. 746 (our main brief, p. 5), this Court expressly held that § 9 of the Shipping Act of 1916 gives rise to a collision lien where a merchant vessel is concerned. Respondent contends that § 9 was repealed by the Suits in Admiralty Act, saying:

"Shortly after the decision in *The Lake Monroe*, the Suits in Admiralty Act was reported by the Senate Committee on Commerce for the express purpose of withdrawing the consent of the United States to the seizure of its vessels (pp. 10 and 11).

This statement of the purpose is precisely correct. It was the seizure while in Government possession, not the creation of the lien, that Congress aimed to avoid. *Blamberg Bros. v. United States*, 260 U. S. 452, 458; *The Isonomia*, 285 Fed. 516, 519 (C. C. A. 2).

The purpose is perfectly plain from the language of the Act itself. Nowhere are there words that abolish lien liability. The first section provides that no vessel owned by the United States shall "be subject to arrest or seizure". Section 3 provides that suits *in personam*, allowed in substitution for suits based upon seizure *in rem*; shall proceed as in like cases between private parties, *allowing libellant to elect to proceed as in rem*. Language better calculated to preserve the lien in all its aspects, except seizure to obtain security, can scarcely be imagined. Respondent cannot deny that the United States remains liable as *in rem* in a suit brought *in personam* under the Suits in Admiralty Act. Plainly the purpose was to preserve all the incidents of *in rem* liability excepting only seizure.

Respondent's argument that the re-enactment of § 9 of the Shipping Act of 1916 by § 18 of the Merchant Marine Act of 1920 cannot be viewed as intended to nullify the objective of the Suits in Admiralty Act is based upon an erroneous view as to what that objective was. If it be understood that the objective of the Suits in Admiralty Act was to prevent only the seizure of vessels while in Government possession, there is no inconsistency.

This Court's decision in *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, is not helpful here for the reasons stated at page 12 of our main brief and because no question of lien was involved. Respondent's argument that it is even clearer in this case than in the *Johnson* case that the Suits in Ad-

miralty Act is exclusive, wholly overlooks § 4. If Congress had aimed to exclude such a suit as this how can any meaning whatever be given to § 4, which expressly makes provision for Government intervention in a suit against a privately owned vessel upon a lien arising during Government ownership?

Respondent argues that § 4 was included because Congress was mistaken as to the law in regard to the existence of liens. But Congress was not mistaken. It expressly created such liens by § 9 of the Shipping Act of 1916 and reiterated its creation of such liens by re-enacting § 9 in § 18 of the Merchant Marine Act of 1920.

Respondent's entire difficulty on this point stems from its failure to understand that the purpose of the Suits in Admiralty Act was, so far as lien liability is concerned, merely to prevent the seizure of vessels in Government possession and not to interfere with any of the other aspects of lien liability. Until Congress amends § 9 of the Shipping Act of 1916—and it has had long opportunity to do so if *The Bascobal*, 295 Fed. 299, was wrongly decided—liens do arise when Government vessels are in collision.

Respondent asserts that our argument is "verbal" and that the language of § 5 as chosen by Congress does not support us. Respondent overlooks the substance of our argument which applies as well to the language of "other suits hereunder" as to the language of "suits as herein authorized". The Suits in Admiralty Act authorized suits against the United States *in personam* and provided a two-year limitation as to such suits, i.e., "suits hereunder". This is not a suit *in personam* against the United States but a suit against a privately owned vessel.

Respondent's difficulty arises from its attempt to apply to a suit *in rem* based upon a lien arising under § 9 of the Shipping Act of 1916 a limitation directed against suits *in personam* authorized by the Act of March 9, 1920.

Respondent's argument that Congress cannot have intended § 5 to apply only to suits *in personam* overlooks the purpose of § 9 of the Shipping Act of 1916 which was to place Government merchant vessels on a parity generally with privately owned vessels. In this statute Congress was content to allow the ordinary rule of laches applicable between private parties to control.

If, as respondent intimates, a reversal of *The Bascobal*, 295 Fed. 299 (C. C. A. 5), and *The Caddo*, 285 Fed. 643, is necessary after twenty years to protect the saleability of the Government's merchant vessels after the war, we suggest that appropriate representation to Congress would result in an early and satisfactory modification of the statute without injury to the petitioner, whereas to affirm the decision below will be tantamount to a retroactive amendment of the statute, leaving petitioner without recourse to recover the amount which respondent does not deny is in good conscience due.

Respectfully submitted,

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Dated, New York, N. Y., November 25, 1942.